No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DAVID F. DAWSON,

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF DELAWARE

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QUESTION PRESENTED

May the State of Delaware use the petitioner's constitutionally protected, however unpopular, racist association or belief as an aggravating circumstance in a capital sentencing hearing in order to support a sentence of death for murder when there is no evidence that the murder was motivated by this association or belief?

LIST OF ALL PARTIES

The names of all of the parties to the proceeding in the court whose judgment is sought to be reviewed by means of this petition appear in the caption of this case and include only DAVID F. DAWSON and the STATE OF DELAWARE.

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TO THE SUPREME COURT OF THE STATE OF DELAWARE

Petitioner, David F. Dawson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Delaware entered on October 4, 1990 affirming the judgment and sentence of death imposed by the Superior Court of Kent County, Delaware after his conviction for the murder in the first degree.

OPINIONS BELOW

The opinion of the Delaware Supreme Court at issue was filed on October 4, 1990, and is cited in the advance sheets as David F. Dawson v. State of Delaware, 581 A.2d 1078 (Del. Supr. 1990). The slip opinion appears in the Appendix.

JURISDICTION

The petition for certiorari is for review of the judgement and opinion of the Delaware Supreme Court filed on October 4, 1990, which is the direct appeal of a criminal conviction for murder in the first degree and for which a sentence of death has been imposed on the petitioner.

This Court's jurisdiction to review this matter is predicated upon 28 U.S.C. §1257(a) and Supreme Court Rule 20.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

The Sixth Amendment to the United States Constitution provides, in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ....."

The Eighth Amendment to the United States Constitution provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "...nor shall any state deprive any person of life, liberty, or property without due process of law."

The pertinent text from the applicable state statutes, 11 Del. C. Ann. §636, **"Murder in the first degree; class A felony,"** and 11 Del. C. Ann. §4209, **"Punishment, procedure for determining punishment, review of punishment and method of punishment for first-degree murder** is contained in the Appendix at pages 100 through 102.

STATEMENT OF THE CASE

On the afternoon of December 1, 1986, Madeline Kisner was found dead in her home in Clayton, Delaware, murdered during a burglary. (Op-7).[1] Earlier that morning the petitioner, David Dawson, and three other prisoners had escaped from the state correctional facility several miles distant. (Op-4). The petitioner, David Dawson, was later arrested and charged with Robbery, Burglary, Murder and weapons offenses as a result of the Kisner murder.[2] Following a jury trial, Dawson was convicted on all counts related to the burglary and murder. (Op-2).

Following the findings of guilt, a penalty hearing was conducted in order to determine the penalty for Murder in the first degree pursuant to 11 Del. C. §4209. (Op-2). Three statutory aggravating circumstances, having already been supported by proof at the guilt phase of trial, were relied upon by the State and found by the same jury at the penalty hearing to have been established: 1) The murder was committed by an escapee from a place of confinement; 2) The murder was committed during the commission of a burglary or robbery; and, 3) the murder was committed for pecuniary gain.[3] (Op-53).

The State also relied, however, upon the petitioner's beliefs and membership in a white supremacist prison organization known as the Aryan Brotherhood and his alleged satanistic beliefs as non-statutory aggravating circumstances to persuade the sentencing jury to impose a sentence of death on the petitioner.[4] (Op-47,48,49).

Prior to trial the defense had objected to the introduction of any evidence concerning the defendant's alleged membership in the Aryan Brotherhood during the trial or penalty phase on the ground that Dawson's First Amendment rights of freedom of belief, freedom of association, freedom of religion, and due process rights would be violated if the State were allowed to introduce such evidence. (Op-47,48; A-72,73,74,75,76)

The trial court rejected petitioner's contention that the First Amendment precluded the admission of such evidence at his penalty hearing and ruled that the admissibility of such evidence would be determined during the penalty hearing at the time of its proffer by "judg[ing] its probative value and any defense balancing as necessary under Rule 403 in the context of what proceedings are

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[1] References to the Appendix will be designated "A-" except that the citation "Op-" will refer to the slip opinion which is found in the appendix at the corresponding pages. (eg. Page 8 of the slip opinion will be found at A-8 of the Appendix).

[2] No other direct or circumstantial evidence, other than a later statement from the petitioner, implicated the three other prisoners in the homicide.

[3] One statutory aggravating circumstance must necessarily have been established as a condition precedent to a jury's recommendation of death. 11 Del. C. Ann. Sec. 4209 (e) (1). In addition, each of three counts of murder of which the petitioner had been convicted, 11 Del. C. Ann. Sec. 636 (a), (2), (6), (7), also constituted a statutory aggravating circumstance as a matter of law although each of these counts and the enumerated statutory aggravating circumstances essentially overlapped . 11 Del. C. Ann. Sec. 4209 (e) (2).

[4] The State also offered evidence concerning the defendant's prior criminal history as a non-statutory aggravating circumstance.

at the time in which the evidence is offered." (Op-14,15; A-77). Again, before the commencement of the penalty hearing the defense renewed its objection that such evidence should be excluded during the penalty hearing because it would violate the petitioner's First Amendment rights of freedom of association and freedom of religion and due process and also because it was inflammatory and irrelevant. (Op-47,48).

At that time, the State represented that it intended to introduce: 1) expert testimony concerning the origin and nature of the Aryan Brotherhood, 2) photographs of the petitioner's body depicting various tatoos, including one associated with membership in the Aryan Brotherhood and one which depicted the word "Abbaddon", 3) testimony that the petitioner referred to himself as "Abbaddon" and that the name meant "one of Satan's disciples" or "angel of the bottomless pit", and 4) a picture of a swastika painted on the wall of the petitioner's prison cell. (Op-47).

The trial court directed the prosecution to provide a proffer of the evidence it wished to introduce concerning the Aryan Brotherhood and the petitioner's membership therein. (A-78,79). In response, the State indicated that it intended to call an expert employed by the Federal Bureau of Prisons whose particular area of expertise was "disruptive groups" who would testify that the original Aryan Brotherhood began in California and that separate groups calling themselves the Aryan Brotherhood thereafter sprang up in various other penal institutions across the country. (A-80). The prosecution conceded that it had no idea of "what specific

attributes might be applicable to a Delaware inmate who is a member of an Aryan Brotherhood." (A-82,90). According to the prosecution, there was no one with any expertise on the Delaware branch of the Aryan Brotherhood and, although its expert was

> "not familiar with the Delaware off-shoot of the Aryan Brotherhood, [he could] help the jury in the sense that he can tell us something about Aryan Brotherhoodism. He can tell us what that is."

(A-81). The State conceded that its expert would testify that there are various state adaptations of the Aryan Brotherhood from prison to prison without a national cohesiveness:

> "he will tell us that Texas Aryan Brothers do not recognize Arizona Aryan Brothers and vice versa and members of the Aryan Brotherhood in the State system don't necessarily recognize Aryan Brothers within the federal system."

(A-80,81).

The State also conceded petitioner was not a full-fledged member of the Aryan Brotherhood: "[there] are those such as Mr. Dawson who merely ascribe to that set of values.... [and] are not identified as full-fledged members" (A-86). When asked by the trial Court how the Aryan Brotherhood could be tied into the petitioner, the prosecution responded in part:

> "Well, Your Honor, as I said, it wouldn't be tied in a specific sense. The State can't produce an expert who can tell us that David Dawson holds this particular belief or David Dawson acts upon this particular belief. What we seek to introduce is some understanding of what David Dawson ascribes to himself, the label Aryan Brotherhood."

(A-82). The prosecution later expanded on this point:

> "In other words, we are looking at the character of the man, David Dawson, and not only things that he does.....What is important for the jury to understand is

what he is into. This is his character. His character is he thinks the Aryan Brotherhood is a really neat organization and he believes in the things that they believe in. He wears their tattoo. He wears their belt. He carries their literature, he paints his wall and so forth."

(A-85,86). According to the prosecutors, some literature seized from the petitioner's prison cell "deal[t] with kinds of white supremacy as religion." (A-84).

At the conclusion of the foregoing proffer by the prosecution, the trial court asked defense counsel: "Doesn't the joining of the Aryan Brotherhood provide at least some clue as to the character of the individual who would do that?" to which defense counsel responded:

> Yes. It provides some clue as to his character, but our position is that when it shows his character by indicating what his beliefs are, he should not be punished for his beliefs. If the jury is to impose a death penalty, they should base it on the crimes for which he has been convicted today, his crimes in the past, actions that he has done or failed to do. But he shouldn't be punished for some abstract thought of what he believes in that he has not acted upon. The fact that he may not like any of the people in this room is not really relevant if he has taken no action against anyone. <u>What one individual thinks in his or her mind should not be a ground used to find a fact to give to condemn that person to death</u>.

(A-87,88). (emphasis added). The trial court then asked that prosecution:

> ...Doesn't evidence about the Aryan Brotherhood, as it exists or may exist elsewhere, present the potential for diverting the jury's attention away from Dawson's background and record and the circumstances of the crime?

(A-88), to which the State responded in part:

> It does to the extent that we get bogged down in the minutia of the various state adaptations. I would agree with the Court. The State did not envision spending a

morning with this expert, as I say, but we do think that the defendant's character is relevant and the fact that he would ascribe to a set of beliefs that are known to be held by the Aryan Brothers. In other words, if the defendant thought himself a Swedenborgin, that is a Christian religion. I don't know too much about it, but I don't know if the FBI here does, but it is a Christian religion and it is a good religion. I know some people who are in it and they are good people. If that man was on trial for his life, it might make sense in litigation for that defendant to be permitted to have someone testify as to what Swedenborgins are and what beliefs they hold, why someone would want to be a Swedenborgin and why and what tells you about the man who is on trial. Likewise, Amish people or any other group. I mean, I merely flip it over so analytically we don't get bogged down with the fact that the defendant's particular beliefs manifest themselves through his membership in an organization that is committed to something other than laudable goals. The fact that the group happens to be the Aryan Brotherhood shouldn't change the interest whether it's relevant and admissible and so forth, or whether it's unnecessary and unfairly diverts the jury's attention. The State's position is that the jury should be permitted to focus on the Aryan Brotherhood as an organization, as a recognized organization.

(A-88,89).

The prosecution told the trial court that there was no indication that petitioner did anything unlawful in conjunction with his membership in the Aryan Brotherhood and that the petitioner's ideology alone without any associated illegal conduct was itself material to the issue of whether the petitioner should be put to death:

> THE COURT: Other than perhaps painting his wall, has Mr. Dawson, in conjunction with his Aryan Brotherhood membership as it is purported to be, done anything unlawful while in prison?
>
> PROSECUTOR: Well, he may have, Your Honor. Nothing that we have caught him at.
>
> THE COURT: Anything that the State could offer?
>
> PROSECUTOR: No, Your Honor.....We don't think it is

> important that whether he acted or not acted on his membership in this group--what he thinks is important is that is the kind of thing he ascribes to. That is his character. He thinks that the Aryan Brotherhood is an organization that he wishes to align himself with.

(A-92). The defense took express exception to the State's assertion that ideology not accompanied by anti-social conduct is material to the issue of whether a person should be put to death:

> Your Honor, our position on that is if I may give Your Honor two examples. Let's assume for the sake of argument that the State would prove by some means that my client likes Adolph Hitler. Let's also assume that the State could prove by some means that my client likes the Pope. If he takes no action based on his like for Adolph Hitler or like for the Pope or dislike for the Pope, so what. If it is a feeling he has, if it is a belief he has, it is totally irrelevant. If the State can tie it in, that because of his belief, he has acted in some improper way, then it becomes relevant. But if it is a belief, something that he has in his mind, it is totally irrelevant. The jury should not be permitted to consider that.

(A-92,93) The defense reiterated similar reasoning in opposition to the State's intention to introduce evidence of the petitioner's alleged belief in Nazism:

> "Once again, Your Honor, our position is that if the State can only show a belief, that is not sufficient; whether it is Nazism or Aryan Brotherhoodism or whatever. If they can tie that into an act because of my client's alleged Nazi beliefs that he specifically--and let's say, for instance, incited a prison riot or whatever they want to, if they can tie it into an act, they should be entitled to introduce that. If it is something that this man has in his head and merely paints it on his wall, he shouldn't be put to death for that.

(A-94).

The State took the position that because the defendant was entitled to offer "character" evidence in mitigation, it was entitled to introduce "character" evidence not merely in rebuttal of character evidence offered in mitigation but affirmatively in

support of imposition of the death penalty:

> Your Honor, I think that is fine. I mean if the defense is not inconsistent in their logic. If they want to introduce or if they think that things he has done--excuse me organizations he has joined, beliefs he may hold that are admissible to show his character and propensities in a penalty hearing, then the same thing applies for beliefs and organizations he has joined which are bad. You can't have it both ways. They are either all in or all out.

(A-94).

The trial court ruled that evidence of Dawson's membership in the Aryan Brotherhood as well as the nature and origin of that group was probative as the issue of character and whether or not the jury should impose a sentence of death:

> membership or the act of joining an organization of any particular kind, whether it be the Aryan Brotherhood or the Boy Scouts of America can be probative of character, at least to some extent. The real issue before the Court is whether the probative value is outweighed by the danger of unfair prejudice.

(Op-48, A-95).

Prior to the commencement of the penalty hearing, the parties stipulated that:

> The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware."

(A-99). In exchange, the State agreed not to call an expert witness to explain the nature and origin of the organization. (Op-48). Besides this stipulation, the State presented evidence at the penalty hearing before the jury that the defendant's hand bore a tattoo with the name Aryan Brotherhood and a symbol contained in it. (Op-48). In addition, over the defendant's objection, the

State was also permitted to offer evidence that a tattoo containing the term "Abbaddon" was located across petitioner's stomach area and that Webster's dictionary defines "Abbaddon" as "angel of the bottomless pit." (Op-49). The State also presented testimony that on the same night following the homicide the petitioner introduced himself to someone he had met that night as "Abbaddon" and said that name meant "one of Satan's disciples."[5] (Op-49).

The State presented no other evidence during the penalty hearing concerning the Aryan Brotherhood in addition to the aforementioned stipulation nor did it present evidence of any conduct by petitioner which it ascribed to his membership in the Aryan Brotherhood. Instead, the sole evidence presented to the jury concerning the Aryan Brotherhood was that its ideology was that of white racism. Despite the absence of any evidence of misconduct by Dawson which could be ascribed to his membership in the Aryan Brotherhood or any acts of misconduct by the Aryan Brotherhood in the Delaware Correctional Center [or anywhere else], the State emphasized the petitioner's membership in a white racist gang as an aggravating factor supporting the death penalty in its opening statement to the jury at the penalty hearing:

> ....You will hear evidence that the defendant is a member of the Aryan Brotherhood and the stipulation will include the fact that the Aryan Brotherhood is a racist, a white racist prison gang.....

(A-96), as well as in its closing statement:

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[5] At the penalty hearing the State did not attempt to introduce any evidence concerning swastikas to which it had earlier alluded.

> ...The character and propensities of the defendant. We introduced evidence to you, ladies and gentlemen, about other things which go directly to his character and propensities. The Aryan Brotherhood is a white racist prison gang. What does that tell you about David Dawson?.....Those are the nonstatutory aggravating circumstances, ladies and gentlemen. Those are other reasons why--those are the character, they reflect the character, the propensities of David Francis Dawson. They tell you what type of person he is. They also call out for the death penalty and what is the response to that?

(A-97,98).

The jury unanimously recommended a sentence of death for the murder convictions. (Op-2). As a mandatory consequence of the jury's recommendation, 11 Del. C. §4209(d), the petitioner was sentenced to death by lethal injection. He received an additional 100 years of incarceration in connection with the other convictions. (Op-2).

REASONS FOR GRANTING THE WRIT

That a State may use constitutionally protected beliefs as an aggravating circumstance against a defendant convicted of murder in order to convince a jury to impose the ultimate punishment of death presents a novel proposition and constitutes a dangerous intrusion to long standing First Amendment precedent as well as to traditional concepts of fairness embodied in the Eighth and Fourteenth Amendments.

This Court is requested to grant certiorari to review whether the State of Delaware may introduce evidence of a defendant's racist beliefs or associations as evidence of character relevant to the individualized determination a jury must make with respect to the appropriateness of the death penalty.

The use of such evidence contravenes the prohibition against the use of constitutionally protected belief in a death penalty hearing as articulated in Zant v. Stephens 462 U.S. 862, 884 (1983). In Zant v. Stephens, the Court wrote:

> Georgia has not, for example, sought to characterize the display of a red flag, cf. Stromberg v. California, 283 U.S. 359 (1931) the expression of unpopular political views, cf. Terminiello v. Chicago, 337 U.S. 1 (1949), or the request for trial by jury, cf. United States v. Jackson, 390 U.S. 570 (1968), as an aggravating circumstance. Nor has Georgia attached the "aggravating" label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example race, religion, or political affiliation of the defendant, cf. Herndon v. Lowry, 301 U.S. 242 (1937)...If the aggravating circumstance at issue in this case had been invalid for reasons such as these, due process of law would require that the jury's decision to impose death be set aside.

Id. at 885. See also Baldwin v. Alabama, 472 U.S. 372, 382 (1985).

The Delaware Supreme Court regarded the petitioner's beliefs and membership in the Aryan Brotherhood to be probative of his "character." Because character is a relevant consideration in a capital sentencing proceeding, the Delaware Supreme Court reasoned that evidence of character must therefore be admissible as an aggravating circumstance by the State in this capital sentencing proceeding regardless of any limitations on admissibility in the context of any other criminal prosecutions.

The First Amendment, however, prohibits the State from punishing an individual solely because of his association with another. NAACP v. Clairborne Hardware, 458 U.S. 886, 918 (1982). In order to punish for what in any other context may also be protected expression, there must exist a specific intent to accomplish the organization's goals by resort to violence. Scales v. United States, 367 U.S. 203 (1961); Noto v. United States, 367 U.S. 290 (1961). Guilt by association with a group, however unpopular, is impermissible absent proof of a specific intent to further the violent goals of an organization. Healy v. James, 408 U.S. 169 (1972).

There was not a shred of evidence in the case below that the group with which the petitioner was accused of associating, (the Aryan Brotherhood), advocated illegal goals or that the petitioner specifically intended to accomplish the goals of that organization by resort to violence. As has already been noted, the evidence only indicated that the organization embraced an ideology of white racism and that it was formed in response to other gangs of racial

minorities.[6]

Even in support of a racist ideology, mere advocacy of the use of force or violence does not remove speech from First Amendment protection unless such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such lawless action. Brandenburg v. Ohio, 395 U.S. 444 (1969).

If the government cannot fine the petitioner $50 for disorderly conduct as a result of such belief, or deny him employment or a passport as a result of such belief, then the government cannot seek the petitioner's death as a result of holding such beliefs. Aptheker v. Secretary of State, 378 U.S. 500 (1964); Elfbrandt v. Russell, 384 U.S. 11 (1966).[7]

A sentence based to any degree on beliefs protected by the First Amendment is constitutionally invalid. United States v. Lemon, 723 F.2d 922 (D.C. Cir. 1983) (prisoner defendant a member of the "Black Hebrews").

Neither the State of Delaware expressly argued nor the Court below expressly found that an individual's personal racist beliefs

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[6] If the State's advocacy of this exception to protected constitutional expression is correct, then nothing would prevent the State from arguing in another context that a member of a racial minority gang must also face that association as an aggravating circumstance in a death penalty proceeding.

[7] If government also could not fine the petitioner $50 for burning an American flag, a question also presented by the case below is whether government could, notwithstanding, use that activity as an aggravating circumstance relevant to character if the flag burner is later convicted of capital murder. See Texas v. Johnson, 491 U.S. ___, 105 L.Ed 2d 342, 109 S.Ct. ___ (1989).

are not to be accorded First Amendment protection. The court below, however, found that evidence concerning the defendant's racist beliefs and membership in the Aryan Brotherhood was admissible as an aggravating circumstance in the capital sentencing proceeding because it focused upon the defendant's character and his view of himself as well as how he wanted to be viewed by others.[8] (Op-55). In rationalizing its result, the court below noted that the petitioner's sentencing jury was required to make an "individualized determination of whether Dawson should be executed or incarcerated for life, based upon Dawson's character, his record and the circumstances of the crime." (Op-53) (citing Booth v. Maryland, 482 U.S. 496 (1987) (emphasis in original); Zant v. Stephens, 462 U.S. 862, 879 (1983); Blystone v. Pennsylvania, 110 S. Ct. 1078, 1083 (1990); Penry v. Lynaugh, 109 S.Ct. 2934 (1989)).

The court below clearly misunderstood the role of character evidence in a capital sentencing proceeding even though a number of prior decisions of this Court have properly defined the role of character evidence. Simply put, general character evidence is to be offered in mitigation not for aggravation of the offense. The court below did not consider that the character of a defendant is a relevant factor which the fact-finder must consider in a capital proceeding when the defendant attempts to offer mitigating evidence

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[8] It might also be observed, perhaps by some artists or their critics, that self-perception and a desire to have one's self-perceptions shared by others is a hallmark of, if not the driving force behind nearly all expressive activity and speech.

concerning his character. Under the Eight Amendment, the State may not constitutionally preclude such mitigating evidence from the fact finder's consideration. Lockett v. Ohio, 438 U.S. 586 (1978).

Several of the more recent decisions of this Court continue to bear out this principle notwithstanding the misplaced reliance of the court below on some of those authorities. In its most recent term this Court explained:

> The requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence. [footnote omitted]. ...the jury was specifically instructed to consider, as mitigating evidence, any "matter concerning the character or record of the defendant, or the circumstances of his offense."

Blystone v. Pennsylvania, 494 U.S. ___, 108 L.Ed 2d 255, 264-265, 110 S.Ct. ___ (1990). In addition, a state cannot, "consistent with the Eight and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigates against imposing the death penalty." Penry v. Lynaugh, 492 U.S. ___, 106 L.Ed 2d 256, 278, 109 S.Ct. ___ (1989). Moreover, "the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). This Court has consistently affirmed the principle that:

> [T]he Eight Amendment mandates an individualized assessment of the appropriateness of the death penalty. ...the Eighth and Fourteenth Amendments require that the sentencer "not be precluded from considering, **as a mitigating factor**, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

Penry v. Lynaugh, 492 U.S. at ___, 106 L.Ed 2d at 277 ((citing Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis in original)). Accord, Eddings v. Oklahoma, 455 U.S. 104 (1982).

Thus, contrary to the State of Delaware's belief otherwise, simply because a defendant may not constitutionally be precluded from putting his character in issue, does not mean that the State may affirmatively put a defendant's character in issue when that character is manifested only in beliefs entitled to protection under the First and Fourteenth Amendments.

The Delaware Supreme Court approved the State's affirmative use of evidence of the petitioner's beliefs in or affiliation with a white racist group as an aggravating circumstance although:

1) there was no arguable racial motive behind the murder or evidence that the murder was in any respect motivated by such beliefs;

2) the sole evidence presented to the jury concerning the group was that its ideology embraces white racism;

3) no anti-social or unlawful conduct was ascribed to the group or to the defendant by virtue of his membership;

4) the defendant's affiliation was not relevant to any issue of credibility; and

5) the defendant's membership was not offered to rebut any

evidence offered on the issue of mitigation of penalty.

This Court has recently said that:

> If there is a bedrock principle underlying the First Amendment it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

Texas v. Johnson, 491 U.S. ___, 105 L.Ed 2d 342, 109 S.Ct. ___ (1989).

The uses to which evidence concerning a defendant's constitutionally protected activities may be permissibly employed in a death penalty proceeding are certainly limited and clearly circumscribed.

Such evidence is permissible to demonstrate a racial motive behind the murder. Barclay v. Florida, 463 U.S. 939 (1983). The State did not contend in the case below that the petitioner's affiliation with the Aryan Brotherhood provided a racial motive or purpose for the murder. (Op-55).

No anti-social conduct or unlawful conduct could be ascribed to the petitioner by virtue of his association with the Aryan Brotherhood. NAACP v. Clairborne Hardware, 458 U.S. at 920.

Under the facts of the case below the petitioner's affiliation with the Aryan Brotherhood was not relevant for any limited purpose on the issue of credibility. No witness was sought to be discredited as a result of bias because of a mutual belief in or association with the Aryan Brotherhood. Cf. United States v. Abel, 469 U.S. 45 (1984).

The State did not offer the prohibited "character" evidence to rebut any character evidence offered by the defendant. If the

defendant had offered "character" evidence to the effect that he was a life-long member of the NAACP or the National Conference of Christians and Jews and believed in their goals, evidence of an actual association with an organization with established antithetical goals, conceivably may have been proper rebuttal. This principle was clearly evident in the Pennsylvania Supreme Court's decision in Commonwealth v. Abu-Jamal, 555 A.2d 846 (Pa. Supr., 1989), cert.denied, ___U.S. ___, 112 L.Ed 2d 175, ___ S.Ct. ___, upon which the Delaware Supreme Court mistakenly relied. The court in Abu-Jamal stated:

> Punishing a person for expressing his views or associating with certain people is substantially different from allowing his statements to be used for impeachment or to be considered as evidence of his character where that character is a relevant inquiry.

Id. at 859 (emphasis added). Because the petitioner never placed his ideology in issue as a mitigating circumstance, his white racist beliefs never became a relevant inquiry.

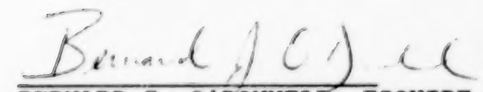
The State's argument, however, that because a defendant is permitted to put his character in issue as a matter of law, such as belonging to the Boy Scouts or the Rotary Club, then the State is also affirmatively permitted to put bad character in issue as evidenced through protected beliefs, thoroughly misunderstands the nature of the protection to be accorded those beliefs. Simply because a defendant might constitutionally be permitted to offer evidence that he is a ordinarily a religious, law abiding man, does not permit the State to offer evidence in the first instance that a defendant facing execution does not attend church.

The Delaware Supreme Court's opinion exhibits a clear confusion of the admissibility of evidence concerning the exercise of constitutionally protected activities for a limited purpose with a general admissibility for the purpose of establishing character warranting the imposition of the death penalty.

CONCLUSION

For all of the foregoing reasons, the petitioner DAVID DAWSON prays that this court grant his petition for a writ of certiorari to review the judgment and opinion below of the Supreme Court of Delaware.

Respectfully submitted,



BERNARD J. O'DONNELL, ESQUIRE

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